No. 89-7024

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1989

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WARREN MCCLESKEY,
*Petitioner,*

vs.

WALTER ZANT, Warden,
*Respondent.*

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ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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# BRIEF OF THE ALABAMA CAPITAL REPRESENTATION RESOURCE CENTER, VOLUNTEER LAWYERS' RESOURCE CENTER OF FLORIDA, INC., AND GEORGIA APPELLATE PRACTICE AND EDUCATIONAL RESOURCE CENTER, INC. IN SUPPORT OF PETITIONER

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*MARK E. OLIVE
Georgia Appellate Practice and
Educational Resource Center
920 Ponce de Leon Ave., N.E.
Atlanta, Georgia 30306
(404) 898-2060

**Counsel of Record for Amici Curiae*

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## INTEREST OF AMICI CURIAE

Amici Curiae -- Alabama Capital Representation Resource Center, Volunteer Lawyers' Resource Center of Florida, Inc., and Georgia Appellate Practice and Educational Resource Center, Inc. (hereinafter "Resource Centers") -- aid in the post-conviction representation of death-sentenced inmates in states most directly affected by the Eleventh Circuit Court of Appeals' decision in McCleskey v. Zant, 890 F.2d 342 (11th Cir. 1989). The Resource Centers, established in part through the efforts of the federal judiciary and funded in part by the Judicial Council and the Criminal Justice Act, were created to help ensure that all death-sentenced inmates in Alabama, Florida, and Georgia are adequately represented in their post-conviction appeals.[1]

Amici strongly concur with, and cannot improve upon, the contentions in the Brief for

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1. Amici file this brief in support of Petitioner by written consent of all parties pursuant to Rule 37.3 of the Rules of this Court. The parties' letters of consent are on file with the Clerk of the Court.

Petitioner (1) that the lower court penned onerous new law and failed properly to apply long-standing precedent regarding deliberate abandonment and inexcusable neglect in resolving whether Petitioner had abused the writ of habeas corpus, and (2) that the lower court wrongly "substituted its own factual findings for those of the District Court" and wrongly "rejected the District Court's conclusion that petitioner's lawyers did not deliberately bypass," Amadeo v. Zant, 486 U.S. 214, 224 (1988), presentation of Petitioner's compelling claim under Massiah v. United States, 377 U.S. 201 (1964). While some is said in the Brief of Petitioner about the lower court's unwriting of precedent, the brief mainly focuses upon the fact of the unwriting rather than upon the resulting impact. For example, as put by Petitioner, "[w]hatever may be said for the wisdom of [the lower court's] rule, it is indisputably not



the present law." Brief of Petitioner at ___.[2]

Amici are uniquely situated to address "the wisdom" of the lower court's new rule. The opinion in McCleskey v. Zant, 890 F.2d 342 (11th Cir. 1989), will severely impair the ability of the Resource Centers to accomplish the mission for which they were established: (1) to recruit additional, highly qualified volunteer counsel to represent capital inmates in state and federal collateral review proceedings; and (2) to provide resources to volunteer counsel -- such as assistance in investigating cases, identifying issues, researching petitions and briefs, and preparing for hearings -- to enable them to represent their clients zealously and effectively. These are highly relevant consequences that have not already been

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2. At the time amici prepared this Brief, the Brief of Petitioner was not in final form. Because proper page citation to that brief is not possible, all references by amici to written arguments made and facts discussed by Petitioner will hereinafter cite Mr. McCleskey's Petition for Writ of Certiorari.

brought to the Court's attention by the parties, and, it is respectfully suggested, an explication of these consequences would be of considerable help to the Court. Rule 37.1.

Recruitment of volunteer counsel will be impeded by McCleskey's requirement that volunteer counsel perform under a strict liability standard. The ruling in McCleskey requires volunteer counsel to: (1) identify every potential claim in a case, whether or not there is any available factual support whatsoever for the claim; (2) investigate each claim exhaustively, even if there have been numerous representations and indications that the claim is factually unsupportable; (3) continue to assert identified claims for which counsel has been unable to garner factual support, because of the possibility that in the future, facts substantiating the claims -- which may even have been purposefully concealed by the State -- will be divulged; and (4) carry out these responsibilities whether or not counsel has the resources to do so or can obtain such resources from the



courts. These conditions will make attorneys who might otherwise volunteer to represent a death-sentenced inmate extremely reluctant -- and outright frightened -- to do so.[3]

In addition, under the current staffing and funding levels of the Resource Centers, the McCleskey standard will force Resource Centers to devote more time and resources to fewer cases in order to approach the goal of effective representation, since no case can be handled properly under McCleskey without an exponential increase in the amount of time and resources devoted to the case. Finally, the Resource Centers' goal of zealously and effectively protecting the constitutional rights of death-sentenced inmates will be seriously undermined by the lesson of the McCleskey decision: that states have

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3. Ethical standards such as Fed.R.Civ.P. 11 may require that claims be abandoned due to a lack of discovered factual support. Nevertheless, McCleskey requires that volunteer counsel -- in contravention of Rule 11 and without any guarantee that they will not be sanctioned under that Rule -- continue to assert baseless claims. See footnote 11, infra.

absolutely no incentive voluntarily to comply with constitutional mandates and, instead, will be rewarded for illegally concealing constitutional violations -- if the violation is hidden long enough, the death-sentenced inmate will not be heard to complain that he or she was denied basic safeguards guaranteed by our Constitution. These consequences should be considered by this Court, and the Resource Centers' distinctive role in the capital post-conviction process in the Eleventh Circuit enables them to provide considerable help to the Court in support of Petitioner.



## SUMMARY OF ARGUMENT

The decision in McCleskey v. Zant, 890 F.2d 342 (11th Cir. 1989), will have far-reaching implications for the litigation of federal habeas corpus petitions by condemned prisoners. McCleskey imposes a strict liability standard on the performance of habeas counsel. The McCleskey court found that Petitioner abused the writ by not asserting his claim under Massiah v. United States, 377 U.S. 201 (1964) in his first federal habeas petition, although the court did not find that it was unreasonable or inexcusably neglectful for Petitioner not to have been aware of the factual substantiation for that claim -- which had been persistently concealed by the State -- at the time he filed his first federal habeas petition.

A strict liability standard is unprecedented as a means of determining the consequences of a criminal defendant's failure to discover factual bases for a claim. It is likewise at odds with settled abuse of the

writ principles and with the equitable underpinnings of the abuse of the writ doctrine. Moreover, the strict liability performance standard imposes an impossible burden on habeas counsel exhaustively to investigate every potential claim and to continue to assert claims even in the absence of available factual support.

McCleskey also creates a disincentive for states voluntarily to comply with constitutional mandates. The State concealed its violation of Petitioner's Sixth Amendment rights for nine years, despite diligent and repeated requests by Petitioner's trial and habeas counsel for any information which might reveal the violation. For its chicanery, the State went not merely unpunished, but was rewarded with a finding that Petitioner -- the innocent dupe in the State's ongoing scheme -- had abused the writ of habeas corpus by asserting the claim in a second federal habeas petition immediately after he serendipitously discovered the factual evidence that had long been concealed by the State. This Court has



refused to reward states' misconduct by procedurally barring petitioners' claims in the procedural default context, and it should likewise decline to condone state wrongdoing in the abuse of the writ setting.

## ARGUMENT

### I. THE DECISION IN McCLESKEY V. ZANT, 890 F.2d 342 (11TH CIR. 1989), IMPOSES A STRICT LIABILITY STANDARD OF PERFORMANCE ON FEDERAL HABEAS COUNSEL WHICH IS NOT ONLY UNPRECEDENTED, BUT ALSO IMPOSSIBLE TO MEET WITHOUT AN INFUSION OF ADDITIONAL RESOURCES FAR IN EXCESS OF THOSE NOW AVAILABLE TO ATTORNEYS REPRESENTING HABEAS PETITIONERS

As Mr. McCleskey's Petition for Writ of Certiorari points out, the lower court's opinion in McCleskey v. Zant, 890 F.2d 342 (11th Cir. 1989), transmogrifies the "abuse of the writ" doctrine to hold federal habeas petitioners, and their attorneys, strictly liable for any failure to discover factual support for a claim during a first federal habeas petition, regardless of the reason for that failure. See Petition for Writ of Certiorari at 28-31. The Eleventh Circuit Court of Appeals found that Petitioner abused the writ of habeas corpus by not including his claim under Massiah v. United States, 377 U.S. 201 (1964), in his first federal habeas petition, even though at the time the first petition was filed, Petitioner and his



attorneys did not know, and had no reason to know, that there was factual support for the claim.[4]

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4. After the conclusion of Petitioner's first federal habeas corpus proceedings, habeas counsel fortuitously discovered evidence clearly establishing a Massiah violation. See Petition for Writ of Certiorari at 13 & n.8. The facts proving the violation -- although concealed by the State for nine years -- were never seriously disputed after they were revealed. Petitioner and three co-defendants were arrested for a robbery during which a police officer was killed. In an effort to discover which of the four participants killed the officer, the victim's fellow officers launched a scheme to procure an illegal confession from Petitioner. Several detectives met with a known jailhouse informer, Offie Evans, and a jailer, Ulysses Worthy, at the Fulton County Jail where Petitioner was confined. During that meeting, the detectives asked Mr. Worthy to move informer Evans from another part of the jail into a cell adjacent to Petitioner's cell. The detectives then arranged for Evans to elicit a "confession" from Petitioner, by coaching Evans about how to approach Petitioner and giving Evans critical facts about the crime unknown to the general public. See Petition for Writ of Certiorari at 3-6; McCleskey v. Zant, Civil Action No. C87-1517A (N.D.Ga. Dec. 13, 1987) at 23-30.

Pursuant to the conspiracy, Evans was transferred to a cell next to Petitioner's and engaged Petitioner in conversation. Eventually, Evans reported all that he had purportedly learned from Petitioner, including an alleged confession to the shooting, to an Assistant District Attorney.

(continued...)

The McCleskey court did not examine whether counsel's ignorance of the facts supporting Petitioner's Massiah claim at the time of the first federal habeas proceedings resulted from an unreasonably sub-standard attorney performance in investigating the claim.[5] Rather than analyzing whether

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4. (...continued)
Evans also recorded his tactics and the results in a stunning 21 page statement to police officials. The information obtained by Evans from Petitioner was the key evidence used against Petitioner at his trial, and the basis for Petitioner's conviction for malice murder and sentence of death. See Petition for Writ of Certiorari at 15-19; McCleskey v. Zant, Civil Action No. C87-1517A (N.D.Ga. Dec. 13, 1987) at 29-31. Evans' relationship with the police and the existence of his 21 page written statement were concealed by the State for nine years after Petitioner's trial, despite repeated attempts by Petitioner's trial and habeas counsel to obtain such information. See Petition for Writ of Certiorari at 8-14, 29-30 n.16.

5. The District Court specifically found that reasonably competent counsel could not have discovered the evidence supporting Petitioner's Massiah claim at the time the first federal habeas petition was filed. See Order in McCleskey v. Zant, Civil Action No. C87-1517A (N.D.Ga. Dec. 13, 1987) at 25; Petition for Writ of Certiorari at 30. Mr. McCleskey's Petition for Writ of Certiorari details the arduous efforts of counsel to obtain factual support for the claim prior to filing the first federal habeas petition, see
(continued...)



counsel's failure to discover the key evidence of a Massiah violation was the product of inexcusable neglect, a lack of due diligence, or a failure to undertake reasonable investigation, the Eleventh Circuit Court of Appeals determined that assertion of the Massiah claim in a second federal habeas petition was abuse of the writ simply because counsel purportedly could have discovered the evidence earlier. McCleskey v. Zant, 890 F.2d at 348-50. The fact that evidence in support of the Massiah claim ultimately surfaced during the second federal habeas proceeding convinced the court that the evidence was discoverable at an earlier time.[6] Without

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5. (...continued)
e.g., p. 8-14, 29-30 n.16, all of which were impeded by -- viewed in the most generous light -- "misrepresentations" by a variety of state actors, which resulted in the concealment of evidence crucial to the Massiah claim for nine years.

6. Even under the court's improper "could have discovered" standard -- which wholly ignores the reasonableness and diligence of counsel's earlier search for factual substantiation of a Massiah violation -- it is not at all clear that Petitioner abused the writ. Because the State
(continued...)

finding counsel's initial investigation of the claim unreasonable or incompetent, the court concluded that Petitioner had abused the writ because counsel's early investigative efforts were "somewhat lacking" and counsel could have engaged in a "more extensive effort at th[e time of the initial petition] to track down persons with information." McCleskey, 890 F.2d at 349-350 (emphasis added).[7]

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6. (...continued)
persistently concealed the evidence, see e.g., Petition for Writ of Certiorari at 8-14, counsel's investigatory efforts, no matter how thorough, may not have uncovered the crucial information before the first federal habeas petition was filed. Counsel was only able to discover the critical piece of evidence after a change in the Georgia Open Records law which occurred after the first federal habeas proceeding. See Petition for Writ of Certiorari at 13 & n.8. That one piece of evidence ultimately led, through a long and tortuous path, to the discovery of the clear Massiah violation in Petitioner's case. Id. at 13-14.

7. An analytical framework for assessing the reasonableness of counsel's decision not to undertake additional investigation was developed by the Eleventh Circuit Court of Appeals in Foster v. Dugger, 823 F.2d 402, 405 (11th Cir. 1987), cert. denied, 108 S.Ct. 2915 (1988):

> When assessing a decision not to investigate, we must make 'every
>
> (continued...)



In so holding, the Eleventh Circuit Court

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7. (...continued)
effort . . . to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.' Strickland v. Washington, 466 U.S. at 689. Counsel need not 'pursue every path until it bears fruit or until all available hope withers.' Solomon v. Kemp, 735 F.2d 395, 402 (11th Cir. 1984) (quoting Lovett v. Florida, 627 F.2d 706, 708 (5th Cir. 1980)); see also Washington v. Watkins, 655 F.2d 1346, 1356 (11th Cir. Unit A 1981), cert. denied, 456 U.S. 949 (1982). The appropriate legal standard is not error-free representation, but 'reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.' Strickland v. Washington, 466 U.S. at 691, 104 S.Ct. at 2066; see also Darden v. Wainwright, 477 U.S. 187 (1986). Accordingly, it is necessary to review those factors that influenced [counsel's] decision to forego further investigation . . .

Under this standard, counsel's decision to cease his considerable investigation of the Massiah violation in Petitioner's case -- an entirely fruitless investigation due to the State's successful concealment of the necessary evidence -- was eminently reasonable. Those formidable efforts, and their futility, are detailed in Mr. McCleskey's Petition for Writ of Certiorari at 8-14, 29-30 n.16, and will not be repeated here.

of Appeals applied a "strict liability" standard to gauge the performance of habeas counsel -- "the principle that in some cases the defendant may be held liable, although he . . . has not . . . departed in any way from a reasonable standard of intent or care." W. Prosser, Law of Torts § 75 at 494 (4th ed. 1971). Under the ruling in McCleskey, habeas counsel has the burden of conducting more than reasonable investigation, more than competent investigation, and more than diligent investigation: counsel must conduct successful investigation -- regardless of the impediments strewn in his or her path -- or forever relinquish a claim. The repeated early efforts of Petitioner's counsel to secure factual support for his Massiah claim, all thwarted by State misconduct and concealment of the evidence, see Petition for Writ of Certiorari at 8-14, were insufficient for abuse of the writ purposes simply because they were unsuccessful, according to McCleskey.

Concededly, a more exhaustive investigation, in which every person who



remotely might have known of the facts establishing Petitioner's Massiah violation was interviewed, might have uncovered the evidence earlier.[8] However, such an investigation has never before been required in any other criminal law context where counsel fails to discover evidence. The consequences of counsel's failure to discover the factual basis for a claim is never gauged simply by demonstrating that, through a more extensive investigation, counsel could have discovered the evidence. Instead, the question is whether counsel should have

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8. For the argument that the evidence was simply undiscoverable, see footnote 6, supra. In Petitioner's case, a thoroughly exhaustive investigation would have required interviewing hundreds of jailers in an indiscriminate attempt to find the one who might have information, see Petition for Writ of Certiorari at 10-11 n.6, even before the critical fact raising suspicions of a Massiah violation -- the 21 page statement of informer Offie Evans -- had been revealed. The statement was discovered only after a change in Georgia's Open Records law which occurred after the first federal habeas proceeding. See footnote 6, supra. Before he had the statement, ccunsel did in fact track down and interview the few jailers whom he was told would be most knowledgeable about the situation. Petition for Writ of Certiorari at 10.

undertaken the additional investigation necessary to find the evidence, measured by a "reasonableness" or "due diligence" standard. The McCleskey court omitted this crucial analytical step, and instead established a new rule requiring habeas counsel to "pursue every path until it bears fruit or until all available hope withers." Solomon v. Kemp, 735 F.2d 395, 401 (11th Cir. 1984)(quoting Lovett v. Florida, 627 F.2d 706, 708 (5th Cir. 1980)).

This requirement -- strict liability for failure to discover evidence regardless of the reasons for that failure -- is unprecedented, at odds with governing abuse of the writ principles, and unworkable. In no other criminal law context is counsel required to meet such a standard of performance. For example, in representing a criminal defendant, counsel's performance need only be reasonable. Strickland v. Washington, 466 U.S. 668 (1981). To secure a new trial on the basis of evidence newly discovered after trial, counsel need only show that his or her failure to discover



the evidence earlier was not due to a failure to exercise due diligence. See 3 A. Amsterdam, Trial Manual 5 for the Defense of Criminal Cases § 457, at 281-82 (1989)(noting that the due diligence standard is a "time-honored" component of the criteria for obtaining a new trial based on newly discovered evidence). To overcome a procedural default created by counsel's ignorance of facts material to a claim, counsel need only "show[] that the factual . . . basis for a claim was not reasonably available to counsel. . . ." Murray v. Carrier, 477 U.S. 478, 488 (1986); see also Amadeo v. Zant, 486 U.S. ___, 108 S.Ct. 1771 (1988)(applying the Carrier rule).

Moreover, settled abuse of the writ principles are manifestly in conflict with a strict liability performance standard. Ironically, the McCleskey court itself cited these long-standing principles, before ignoring them:

> Once the state has alleged abuse of the writ, the petitioner must be afforded the opportunity to justify

his previous failure to raise the claim. In deciding whether a petitioner has presented sufficient justification, courts have required the petitioner to show that he did not deliberately abandon the claim and that his failure to raise it was not due to inexcusable neglect. See Woodard v. Hutchins, 464 U.S. 377, 379, 104 S.Ct. 752, 753, 78 L.Ed.2d 541 (1984)(per curiam)(Powell, J., concurring, joined by four other justices); Demps v. Dugger, 874 F.2d 1385, 1391 (11th Cir. 1989), petition for cert. filed, No. 89-5277, 1989 WL 113448 (Aug. 4, 1989); Witt v. Wainwright, 755 F.2d 1396, 1397 (11th Cir.), cert. denied, 470 U.S. 1039, 105 S.Ct. 1415, 84 L.Ed.2d 801 (1985); Potts v. Zant, 638 F.2d 727, 740-41 (5th Cir. Unit B 1981), cert. denied, 454 U.S. 877, 102 S.Ct. 357, 70 L.Ed.2d 187 (1981).

McCleskey, 890 F.2d at 347. This standard, as interpreted by the Eleventh Circuit prior to McCleskey, forgives federal habeas counsel's failure to raise a claim in a prior federal petition when the legal or factual basis of the claim was unknown, so long as "reasonably competent counsel" would not have been aware of the basis for the claim. Moore v. Zant, 885 F.2d 1497, 1506 (11th Cir. 1989)(en banc). Counsel who, like Petitioner's counsel, (1) conducts a reasonable, though less than fully



exhaustive, investigation, see footnote 5, supra; (2) fails as a result to discover the facts necessary to establish a claim, see id. and footnote 6, supra; and (3) for this reason does not raise the claim in an earlier petition, see Petition for Writ of Certiorari at 12, should not and cannot be held to have abused the writ or deliberately abandoned the claim[9] when facts material to the claim -- which had been hidden by the State -- are later discovered and the claim is immediately presented in a subsequent petition.

The strict liability standard is also at odds with the equitable underpinnings of federal courts' power to dismiss habeas corpus petitions. See McCleskey, 890 F.2d at 346. "In cases of abuse of the writ, equity counsels against allowing 'needless piecemeal litigation' or 'collateral proceedings whose only purpose is to vex, harass, or delay.'" Id. (citation omitted). Conversely, equity must require that petitioners be permitted to

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9. See Petition for Writ of Certiorari at 29-30.

present successive petitions which do not constitute needless piecemeal litigation or are not filed only to vex, harass, or delay. Equitable principles dictate that, in some circumstances, federal courts be willing to find that a habeas petitioner's counsel had previously done "enough" to investigate a claim, such that failure to discover facts substantiating the claim earlier does not bar successive presentation of the claim upon ultimate discovery of the necessary facts.

The imposition of a strict liability performance standard for habeas counsel is not only unprecedented and contrary to governing principles of law, it is also utterly impossible to accommodate. If the Eleventh Circuit Court of Appeals' analysis in McCleskey is the law, the task of habeas counsel in investigating potential constitutional claims is staggering. Every potential claim depending on non-record evidence in every case must be investigated until substantiating evidence is found (even if that evidence is being hidden by the



State), or until there is no other conceivably material witness to interview or conceivably material document to obtain.[10] Even then, habeas counsel cannot abandon the claim, because such abandonment would foreclose future litigation of the claim if new, unthought-of evidence thereafter became available. No lawyer providing zealous representation to a death-sentenced inmate could take such a risk. Thus, the notion of reasonable attorney judgments about the scope of investigation and the viability of claims will evaporate, and, with its demise, the cost of litigating each death penalty habeas case will go up exponentially.[11]

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10. In Petitioner's case, this would have required interviewing several hundred jailers who worked at the Fulton County Jail where Petitioner was incarcerated, because the key document suggesting a Massiah violation was persistently withheld by the State. See Petition for Writ of Certiorari at 10-11 n.6.

11. In addition to monetary costs, the burden on federal courts reviewing habeas petitions, and volunteer attorneys presenting them, will increase substantially. By essentially prohibiting abandonment of non-record evidence claims, the McCleskey rule (continued...)

Under the McCleskey strict liability standard, every case will now consume far more resources than are presently available. It is impossible to determine the long-term consequences of such a rule, but, for the present, radical changes will be required in the operation of the amici curiae Resource Centers in the Eleventh Circuit. The number of cases in which amici curiae provide assistance to volunteer counsel necessarily will be severely reduced, so that resources can be focussed on attempting to comply with the strictures of McCleskey in at least some

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11. (...continued)
will force the courts and counsel to wade through numerous as yet unsubstantiated claims in every federal habeas petition. Moreover, presenting such claims will pose an ethical dilemma for volunteer counsel. Counsel cannot comply with the mandate of McCleskey to continue presenting claims with no factual support and the mandate of Fed.R.Civ.P. 11, requiring counsel to certify that claims presented to the federal court are "well grounded in fact." Volunteer counsel will be forced to choose between the life of a death-sentenced prisoner and the possibility of severe sanctions for unethical conduct. These burdens on counsel and the courts are critical components of the "cost" equation which must be considered in evaluating the McCleskey standard.



cases. Investigative resources and staff attorney time now available to all volunteer counsel will be redirected to this reduced caseload, leaving volunteer counsel to whom amici curiae Resource Centers can no longer devote resources to fend for themselves, without significant support from, or consultation with, the Resource Centers. Inevitably, these "abandoned" volunteer counsel will be forced to ask the federal courts for heretofore unheard of financial assistance to comply with McCleskey.[12]

Ironically, the Eleventh Circuit Court of Appeals' decision in McCleskey comes at a time of national focus on the conduct of capital federal habeas corpus proceedings. The Ad Hoc

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12. This assumes that volunteer counsel will continue to come forward. It is not unimaginable that the pool will quickly dry up when prospective volunteer counsel learn that they bear the burden of representing a death-sentenced inmate under a strict liability performance standard, and the burden of risking Fed.R.Civ.P. 11 sanctions for operating within the dictates of McCleskey. See footnote 11, supra. McCleskey may well demand too much of lawyers who provide their services as volunteers to meet a need which is universally -- but not constitutionally -- recognized.

Committee on Federal Habeas Corpus in Capital Cases of the Judicial Conference of the United States ("Powell Committee"), the American Bar Association Task Force on Death Penalty Habeas Corpus, Congress, this Court, and other federal courts have become acutely concerned about chaos, unfairness, and inefficiency in capital federal habeas corpus. The new McCleskey standard -- even if it were at all supportable as a legal principle -- has extraordinary potential significantly to magnify the chaos, unfairness, and inefficiency that currently plague these cases.



## II. THE DECISION IN McCLESKEY V. ZANT, 890 F.2d 342 (11TH CIR. 1989), UNDERMINES INCENTIVES FOR STATES TO COMPLY WITH CONSTITUTIONAL MANDATES AND ENCOURAGES STATES TO CONCEAL VIOLATIONS OF CAPITAL DEFENDANTS' CONSTITUTIONAL RIGHTS BY REWARDING THEM FOR DOING SO

In its McCleskey opinion, the Eleventh Circuit Court of Appeals turned a blind eye to the State's misconduct in violating, and then concealing the violation of, Petitioner's Sixth Amendment rights. By imposing a strict liability standard for habeas counsel, the court placed the onus of Petitioner's failure to uncover the facts substantiating his Massiah claim wholly on Petitioner, even though those facts were continually concealed by the State for nine years. See Petition for Writ of Certiorari at 8-14. The inevitable result of the McCleskey ruling will be to undermine states' incentives voluntarily to comply with constitutional mandates and to encourage states to conceal violations of capital defendants' constitutional rights.

Like all constitutional principles regulating the conduct of state authorities,

those established to protect the rights of criminal defendants depend heavily upon voluntary compliance by state actors. For example, investigating police officers are expected to obey the rule of Massiah; if they do not, state prosecutors are expected either not to offer the resulting confession into evidence, or to offer the confession with disclosure to defense counsel of a possible Sixth Amendment violation. This Court has long recognized the expectation that prosecutors will disclose evidence that is favorable to the defense:

> [F]or the prosecutor's role transcends that of an adversary: he "is the representative not of an ordinary party to a controversy, but of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done."

United States v. Bagley, 473 U.S. 667, 675 (1985) (quoting Berger v. United States, 295 U.S. 78, 88 (1935)). No one -- not criminal defendants, not the judicial system, not society as a whole -- is benefitted by creating disincentives, such as the one



created by the Eleventh Circuit Court of Appeals in McCleskey, for state actors to conform to the expectations imposed upon them by the Constitution.

The expectation that police and prosecutors will voluntarily honor the constitutional rights of criminal defendants -- and thus serve the higher goal of justice -- will be seriously undermined if McCleskey is allowed to stand. The McCleskey rule insulates police and prosecutors from the adverse consequences of their misconduct in violating, and then hiding the violation of, a defendant's rights. Rather than encouraging voluntary compliance with the Constitution, McCleskey provides an incentive not to comply. Indeed, McCleskey rewards the police and prosecutors for non-compliance so long as they conceal the constitutional violation through the course of first federal habeas proceedings, by prohibiting the habeas petitioner from later obtaining relief for the violation when it is ultimately uncovered. An important sanction for non-compliance with

constitutional mandates -- federal habeas corpus relief -- is removed by McCleskey.[13] McCleskey's tolerance of, and reward for, state non-compliance with constitutional directives will seriously impede amici curiae Resource Centers from fulfilling their ultimate purpose: to protect the

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13. The damage McCleskey will cause to the equitable balance struck by habeas corpus is well illustrated by the facts of McCleskey itself. During his first state habeas proceeding, in which Petitioner asserted his Massiah claim, Petitioner's investigative efforts were thwarted by the State's persistent concealment of the Massiah violation: (1) Although the State purported to provide Petitioner with the complete prosecutorial file, that file did not include the 21 page "transcript" of informer Offie Evans' conversations with Petitioner, which so clearly suggested a Massiah violation; (2) The prosecutor testified in a deposition that, to his knowledge, the State had no informant relationship with Evans at the time Evans allegedly obtained inculpatory statements from Petitioner; and (3) Evans himself denied such a relationship during testimony at the state habeas hearing. Moreover, when the officers involved in the Massiah violation were later interviewed, they persisted in denying any knowledge of the scheme. For the nine years the State concealed its violation of Petitioner's Sixth Amendment rights, the State was rewarded with a finding that Petitioner abused the writ by asserting his Massiah claim in a second federal habeas petition immediately after he ultimately discovered the State's misconduct.



constitutional rights of death-sentenced inmates.

Indeed, this Court has recognized the risks of a rule such as McCleskey imposes, and firmly held that state misconduct can preclude imposition of a procedural bar to consideration of the merits of a constitutional claim in the context of procedural default. In Amadeo v. Zant, 486 U.S. ___, 108 S.Ct. 1771 (1988), the Petitioner was unaware of the facts supporting a jury composition challenge because those facts were in a memorandum hidden among reams of jury lists in the clerk's office. This Court held that

> [i]f the District Attorney's memorandum was not reasonably discoverable because it was concealed by Putnam County officials, and if that concealment, rather than tactical considerations, was the reason for the failure of petitioner's lawyers to raise the jury challenge in the trial court, then petitioner established ample cause to excuse his procedural default under this Court's precedents. The situation . . . fits squarely, indeed almost verbatim, within our holdings in [Reed v. ]Ross[, 468 U.S. 1 (1984)]

and [Murray v. ]Carrier[, 477 U.S. 478 (1986)].

Amadeo, 108 S.Ct. at 1777.

This Court in Amadeo recognized what the Eleventh Circuit Court of Appeals failed to acknowledge in McCleskey: that if the State plays a role in making the discovery of a constitutional violation "'impracticable'" after "'reasonabl[e]'" investigative efforts by defense counsel, Amadeo, 108 S.Ct. at 1776 (quoting Murray v. Carrier, 477 U.S. 478, 488 (1986)), the State -- not the defendant -- must bear the burden of the defendant's failure to raise the claim earlier; the State -- not the defendant -- will be penalized under the procedural rules governing when the merits of a claim may be considered. If the delicate balance of our constitutional system is to be maintained, the same rule applied by this Court in the procedural default context must be applied to abuse of the writ.



## CONCLUSION

For the foregoing reasons, and the reasons detailed in Mr. McCleskey's Brief of Petitioner, this Court should reverse the decision of the Eleventh Circuit Court of Appeals in McCleskey v. Zant, 890 F.2d 342 (11th Cir. 1989).

Respectfully submitted,

Bryan A. Stevenson
Alabama Capital
Representation Resource
Center
114 North Hull Street
Montgomery, Alabama 36014
(205) 269-1803

Steven M. Goldstein
Volunteer Lawyers'
Resource Center of
Florida, Inc.
805 North Gadsden Street
Suite A
Tallahassee, Florida 32303
(904) 681-6499

* Mark E. Olive
Georgia Appellate
Practice and Educational
Resource Center, Inc.
920 Ponce de Leon N.E.
Atlanta, Georgia 30306
(404) 898-2060

COUNSEL FOR AMICI CURIAE

* Counsel of Record